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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 57-59.

THE ASSOCIATED PRESS, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE ASSOCIATED PRESS, *et al.*,
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE ASSOCIATED PRESS.

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November 25, 1944.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Appeals from the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR THE ASSOCIATED PRESS, *ET AL.*

I.

The Issue.

At the beginning of its argument the Government brief (p. 56) quotes the statement from the AP brief (p. 3) that this case presents the question whether the AP.

> "* * * must admit into membership and share its news 'copy', before publication, with other competing papers, on equal terms."

The Government's brief says that these are "false issues." Whether that is so can be ascertained by one very simple test—one simple question, namely:

> What is it that the Government really wants to accomplish in this case?

To answer that question, let us look at the record.

This case arises because a certain newspaper was not admitted into AP. Its object—obviously—is to force the AP to admit that paper into membership.*

The Complaint specifically asks that the admission by-laws be held illegal and enjoined—except to the extent that they require every member to be the sole owner of a newspaper and assent in writing to its by-laws other than those held to be illegal (R. 36).

The Brief of Law filed by the Government in the court below argued (p. 43):

> "Finally, if the reasonableness of defendants' restraints were open to inquiry, the question of the reasonableness of the concerted denial of service to competitors of individual members would have to be judged in the light of the fact *that AP has the characteristics associated with an enterprise 'affected with a public enterprise'* [*sic*] *and which, as such, is charged with the duty to serve all comers.*"**

In the Oral Argument, it is true, Mr. Rugg, co-counsel for the Government below, disavowed—as the Government does here—asking that AP be made a public utility, saying:

---

* The interest of AP, however, is not with respect to the situation in any particular city. It is concerned, rather, with the preservation of its fundamental right to manage its own affairs as a private cooperative news-gathering agency.

** Italics ours herein, unless otherwise noted.

> "We are not seeking to impress the duties and obligations of a public utility or quasi-public utility on the Associated Press. That is a legislative function and not a judicial function" (Transcript of Oral Argument, fol. 7),

However, Mr. Lewin—co-counsel with Mr. Rugg below—argued more bluntly that AP:

> " • • • might well be held by legislature or court affected with the public interest. And the authorities do recognize that the Sherman Act has a peculiar application to enterprises that have those characteristics. And that is not to say that we want this Court by judicial decision to turn this company into a public utility. *It may have the same results in regard to the regulation of its rates and services and all those things,* and engaged in a certain interstate commerce. *That may be the way it will work out.*" (Transcript of Oral Argument, fols. 87-8).

Mr. Kirkland, counsel for certain defendants, said:

> "Mr. Lewin says, and I don't know whether you got it, but he said, 'Well, I do not contend that they are public utilities,' but he says '*we do it in an indirect way.*' What does he mean? He means if you will hold the restraint about AP selling to any but its members, with those two ancillary restraints, that then they will be *forced to take everybody* • • •." (Transcript of Oral Argument, fol. 176).

In their argument below counsel for the Government strongly relied upon—and quoted—as they do here—the *St. Louis Terminal* case—*U. S.* v. *Terminal Association of St. Louis*, 224 U. S. 383—where the Court did order that the Terminal Association take in "all applicants on equal terms."

The Majority Decision of the court below followed the Government lead. It adopted and applied the public-utility

principle as the basis for its decision and it made no secret of what it expected its judgment to accomplish. It said that:

> "• • • to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have • • •" (R. 2595).

Again, the majority referred to AP as:

> "• • • a combination which, though bound to admit all on equal terms, does not do so" (R. 2599).

And, finally, the majority themselves described the effect of their judgment as follows:

> "The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others" (R. 2600).

The dissenting judge—Judge Swan—who certainly must have known what the majority intended—showed that he understood quite well the purpose and result of the majority opinion. He said (R. 2602):

> "What, then, is the ground for holding that the by-law provisions have resulted in an unreasonable restraint of trade either in news gathering or in newspaper publishing? Solely the court's view that a news gathering organization as large and efficient as AP is engaged in a public calling, and so *under a duty to admit 'all "qualified" applicants on equal terms'.*"

The Government Statement As To Jurisdiction, filed in this Court, said (pp. 7-8) that the limited scope of the decree below had been assigned by the Government as error because, under the facts of this case as it described them:

> "• • • all power to exclude other members of the industry should be barred."

The Government's Assignment of Error No. 3 reads as follows:

> "The Court erred in refusing to enter a final judgment enjoining the defendants, and each of them, from promulgating, agreeing to observe and observing, any new or amended by-laws of The Associated Press authorizing denial of membership in The Associated Press *for any reason* other than (1) that the applicant is not the sole owner of a bona fide newspaper published in the United States, (2) that the applicant has not assented in writing to the lawful by-laws of The Associated Press, or (3) that the applicant has not paid to The Associated Press any money contribution which its by-laws may require new members to pay and which is based upon the new member's equitable proportion of the value of the net tangible assets of The Associated Press and is applicable irrespective of whether the new member's newspaper is or is not published in the same city and 'field' (morning, evening or Sunday) as the newspaper of an existing member" (R. 2667).

Technicalities of language aside—can there be any doubt as to what the Government hopes and desires and expects to achieve in this case? Certainly the defendants are under no illusion as to what—as a practical matter—they will be compelled to do.

The Government now disavows any intention to impose on AP any obligation to take in anybody—or otherwise to impose public-utility obligations (Govt. br., pp. 56, 122).

But suppose that the defendants should pass a new by-law saying that no further members will be admitted—is it conceivable that the Government would not oppose such a by-law on the ground that it was an evasion of the holding of the court below?

Moreover—disavowals to the contrary—the cases cited and the arguments advanced by the Government in its present brief are in substance the same as the arguments advanced below—namely, that AP, because of the nature of the news-gathering industry—and because of its size—and because of its form of organization—is subject to legal principles which would compel it to admit all applicants on equal terms.

Thus—

(1) It asks the Court to apply the precedent in the *St. Louis Terminal* case, 224 U. S. 383—claiming that this case requires the admission of all applicants on equal terms, and that the position of AP is similar to that of the Terminal (Govt. br., pp. 48, 84, 124-5).

(2) It cites the boycott cases and then says that the Court can apply either *affirmative* or *negative* injunctions, saying that in a number of cases the decrees have been affirmative in form, requiring the defendants to deal on equal terms with those who had been previously excluded (Govt. br., p. 123).

(3) It argues that it is a "basic principle" of cooperatives, such as AP:

> "• • • that membership shall be open upon equal terms to all persons in the class of those served by the cooperative" (Govt. br., p. 67).

(4) It cites certain trade association cases where the defendants are claimed to be affirmatively required to make their statistical information "fully and fairly available" to others (Govt. br., pp. 48, 81-84).

(5) It argues that public policy requires that the defendants' proprietary interest in the AP copy be sacrificed to the public interest (Govt. br., pp. 89-92). This can only

mean that the alleged public interest requires the defendants to share the AP copy with their competitors before they publish it themselves.

(6) The Government brief does not disclaim its Assignment of Error No. 3—quoted above—although it nowhere directly mentions it—but instead, under the heading "Specification of Errors to be urged in No. 59," talks in a vague manner about the inadequacy of the judgment below (Govt. br., p. 45). It only disclaims any intention to rely upon certain other of its specifications of error—thus implying that it still stands upon its Assignment No. 3.

(7) Finally, the *amicus* brief filed on behalf of Field Enterprises, Inc., leaves no question as to the character of the relief desired by Mr. Field. It asks (pp. 19-20) for a decree which will specifically require the admission of the papers excluded in the past and the admission of all future applicants "except for cause"—a decree which will make AP "the real agency of all qualified American newspapers."

On this record can it be denied that the real object of the Government is not merely negative but affirmative—to force the AP members to relinquish their own legitimate self-interest—and to share their "copy" with their competitors before they have an opportunity to publish it themselves?

The Government is seeking to accomplish indirectly what it believes it cannot ask directly.

II.

AP does not have a monopoly, and the Court below unanimously so found.

The Government's brief says—not once but repeatedly—that AP has an effective monopoly (Govt. br., pp. 86, 87).

This at most is a disputed issue of fact.

The Government made the same claim below—based on the same evidence—and the court below unanimously held to the contrary.

All three judges concurred in the following (C. IX-XI, R. 2629):

> *"AP does not monopolize or dominate the furnishing of news reports, news pictures, or features to newspapers in the United States.*
>
> *"AP does not monopolize or dominate access to the original sources of news.*
>
> *"AP does not monopolize or dominate transmission facilities for the gathering or distribution of news reports, news pictures, or features."*

Certainly the Government may not now claim—on motion for summary judgment—that the record shows without dispute what all three judges denied.

The detailed Findings of Fact—and the evidence in this case—show that the question of monopoly was not only controverted—but was affirmatively disproved. These findings—*to which the Government did not assign error*—and this evidence have been discussed in the AP main brief, pages 11-14 and 17-32.

We desire to point out briefly, however, that AP is faced with powerful, effective and rapidly growing competition from two large agencies whose services the court below found "comparable in size, scope of coverage and efficiency" with AP, and from 20 to 30 other news agencies

—which, although smaller than AP, were nevertheless found by the court to furnish substantial news reporting services (F. 36, R. 2610-1). Certain of these smaller agencies could be readily expanded if there were sufficient need to provide services similar to those of the larger agencies (R. 1311, 1614).

The Government cites figures to the effect that AP serves papers having a very large proportion of the country's circulation—but similar figures can also be cited to show that UP—to refer to only one of the competing news-gathering agencies—likewise serves papers having a "preponderant" proportion of the total circulation of the country. UP serves approximately 65% of the entire newspaper circulation of the country—64% of the morning circulation and 65% of the evening circulation (F. 85, R. 2618).

The mere fact that one competitor is larger than another does not constitute monopoly—especially where, as here, other adequate, efficient and comprehensive services exist—and have grown up since AP was organized and are continuing to grow.

The following UP advertisements—a number of which appear in the record—are illuminating:

"United Press Dominates!"

"Because United Press has the most bureaus, the most member newspapers, the greatest news-gathering resources" (R. 1558 D).

"The largest and most far-reaching news service in the world" (R. 1556 A).

"The world's best coverage of the world's biggest news" (R. 1558).

Another of its advertisements reads:

"United Press Statistics

"The world-wide news service of the United Press is used by more than 1,460 newspapers and nearly 500 radio stations.

"To speed its news from world capitals and centers of activity around the globe, the United Press employs every modern means of communication—wireless, telex printers, transoceanic cables and telephones.

"In the United States alone, 176,000 miles of leased wire are required to carry the United Press news report to newspapers and radio outlets serving communities in all 48 states and the District of Columbia. The United Press is the only press association operating a coast-to-coast wire, supplying news to radio stations exclusively.

"Over its numerous news channels, domestic and foreign, are moved an estimated total of 750,000 words daily.

"A corps of 1,500 highly trained, full-time correspondents man the 110 United Press bureaus located in every important news center in the world. United Press prides itself on the fact that its key men everywhere are trained in the best traditions of American journalism. Their working creed is accuracy and impartiality. In addition to its full-time correspondents, United Press has another 55,000 contributing correspondents, stationed in county seats, small towns and at country crossroads—a total of 56,500 United Press noses for news" (R. 1557-8).

Additional discussion of the facts upon this issue may be found in the AP main brief, pp. 11-14 and 17-32, and also in the Appendix, *infra*, p. 49.

III.

Whether AP members have any advantage over non-members is at most a controversial issue of fact.

Whether the possession of AP copy gives to the AP members any competitive advantage over non-members

(Govt. Br., p. 57, *et seq.*), is of course a question of fact. The allegation in the Government Complaint (R. 19) with respect to such competitive advantage was denied in the AP Answer (R. 126). The position of the defendants in this case is that the advantages alleged are either non-existent or at most controversial.

The court below made no finding that the AP service is any better than the services of its leading competitors. It said that the opinion of the calling differs sharply on that subject (Op., R. 2593-4; 2585; 2586-7). Other agencies claim that their services are as good or even better (R. 1556A; 2111, 2112, 2119, 2128-9, 2131, 2132, 2134). Many newspapers are shown to prefer reports other than those of AP (AP main brief, pp. 23-32).

The news facts themselves are open to all (F. 27, R. 2609).

The great growth and the intense competition of other agencies show clearly that competitively the field is open.

The court below specifically found that both UP and INS offer services that are "comparable in size, scope of coverage and efficiency" with those of AP (F. 36, R. 2611).

As a matter of law, we believe that this whole question is legally irrelevant.

In any event, it is at most highly controversial. It presents triable issues of fact, and in this proceeding for summary judgment the Government has waived the right to rely upon issues of that character.

Consequently we shall not stop to discuss these controversial issues at this point. If the Court desires such a discussion, we have attached one for the convenience of the Court at page 49 in the Appendix of this brief.

IV.

A private cooperative news-gathering agency is not illegal *per se*.

We have urged, in our main brief, that it is—and always has been—lawful for men to cooperate with each other, to do something that they could not do so well alone. Cooperation is not illegal *per se*.

Of course—like any other group organization—in whatever form—a cooperative will become illegal if it acquires a monopoly.

It may be guilty of wrongful acts—such as coercion, intended to drive competitors out of business—or otherwise control their conduct.

In the absence of such factors, a cooperative whose sole object is to create something for the members' own personal use—and which does not seek in any way to control or injure others—is not unlawful.

The Government has been unable to deny these principles. It has not been able to cite a single case where one or more of these additional circumstances did not exist.

The Government takes the position without supporting authority that such a private cooperative is illegal *per se* because it excludes others from the enjoyment of what the members have created (Govt. br., pp. 68-69, 74-75).

The cases cited by the Government brief (p. 69) (*Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 613; and *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 467) to the effect that a combination which violates the anti-trust law cannot be justified by economic arguments are wholly irrelevant. Those cases were typical boycotts—for the express purpose of coercing others. Such boycotts are and always have been illegal *per se*. The Retail Lumber Dealers were boycotting

wholesalers to compel them to stop selling direct to consumers. The Fashion Originators were directing a secondary boycott to drive out of business competitors who copied their fashions.

On the other hand, the Government is unable to explain away the cases which we cited in the AP brief which did involve private cooperatives—whose action was held to be entirely lawful. Thus, in the *St. Louis Terminal* case, 224 U. S. 383, this Court specifically said (p. 405):

> "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals *for their common but exclusive use.* In such cases other companies might be *admitted upon terms or excluded altogether.*"

We have only to substitute "newspapers" for "companies", and "news" for "terminals", and that statement fits perfectly our contention in the present case. With those substitutes, the language of this Court would read as follows:

> "It cannot be controverted that, in ordinary circumcumstances, a number of independent *newspapers* might combine for the purpose of controlling or acquiring *news* for their common but exclusive use. In such cases other *newspapers* might be admitted upon terms or excluded altogether."

Similarly, in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, this Court said (pp. 373-4):

> "A coöperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint * * *."

Again, in *Prairie Farmer Publishing Co.* v. *The Indiana Farmer's Guide*, 88 F. (2nd) 979 (C. C. A. 7th) (in which *certiorari* was twice asked for and *twice* denied by this Court (301 U. S. 696 and 302 U. S. 773), a cooperative group of farm papers offered advertising rates lower than the sum of their individual rates for advertising. A competing paper—which had been excluded from the group—brought suit under the Sherman Act. The court (p. 983) approved the acts of the defendants on the ground that they were:

> "• • • a proper step by appellants in their efforts to bring about economy of cost of procuring advertisements, in their competition with national magazines, the effect of which was only indirectly and incidentally to put appellee in the position of a less favored competitor • • •. Unfortunately, appellee was not in position to meet that competition; but that fact, it seems to us, is one of the fortunes of the development of industrial practices, and its existence should not stamp with the stigma of illegality the act of appellants."

See also the other cases cited in the AP brief (pp. 68-74 and 83-87), particularly those cases which involve stock and commodity exchanges with limited memberships and cases directly involving the rights of news agencies to exclude competitors (pp. 83-87). Some of these cases arose under the common law and some under the antitrust laws, but they all show that:

(1) It is normal, usual and lawful for men to cooperate to accomplish something together which they cannot accomplish separately; and that

(2) They have the right to choose their own associates in accordance with their own legitimate self-interest.

An analysis of some of the principal cases thus cited—refuting the Government's claim that they are irrelevant to the issues here presented—follows in Point VI, *infra*, pp. 17-25.

The statement in the Government brief (p. 67) that it is a basic principle of non-profit consumer cooperatives that membership shall be open to all on equal terms is completely unjustified as a statement of law. There is no principle of law that requires such a result.

The cases cited herein and in the AP main brief all dealt with cooperatives which were not open to all. Indeed, the Government brief itself in a footnote (p. 67) points out that a cooperative to produce something (which is what AP is) stands upon a different footing.

The Government argument—as we have said—comes to this—that there can be no such things as *private* cooperatives—farmers' cooperatives, mutual insurance companies, mutual broadcasting companies—or mutual news-gathering agencies.

It is novel conception of the law that a closed cooperative is illegal as such. Is it to be illegal for farmers to have a closed cooperative to buy and run a wheat "combine"—or a creamery—or an apple packing plant—or a storage warehouse?

That there is no principle of law that cooperatives must admit all applicants is denied by a Bulletin published by the Department of Agriculture itself, entitled *Legal Phases of Cooperative Associations*, by L. S. Hulbert, Farm Credit Administration, U. S. Department of Agriculture, Bulletin No. 50, May, 1942. This Bulletin, under the heading "Who May Become Members", says (pp. 65-66):

> "May a cooperative association select its members and thus determine for whom it will market products or furnish supplies? Judging by the decisions of the courts with respect to other organizations, the

> answer is 'Yes.' In the absence of a statute prescribing rules relative to the admission of members or stockholders, an association at common law is free to accept some and reject others. With respect to non-stock associations, numerous court decisions support this view."

The Bulletin also states under the heading "Admission of Members in Unincorporated Associations":

> "It has been previously stated that an unincorporated association may prescribe the qualifications of members. It cannot be compelled to admit as members persons whom it chooses to exclude" (p. 296).

V.

It is not unreasonable or unlawful for a cooperative group to desire to keep what they have jointly created for their own use.

The defendants are cooperating to produce "copy". That "copy" has value. It is not unreasonable for them to ask that the news they collect—the "copy" they prepare—the service they originate—shall be their own.

The Government has failed to advance any convincing arguments to the contrary.

This is not a case where the defendants have combined to monopolize anything. They have not combined to coerce anyone. They have combined to *create* something.

This Court itself has declared that the purpose of The Associated Press is a normal and legitimate purpose:

> "not only innocent but extremely useful in itself."
>
> (*International News Service* v. *Associated Press*, 248 U. S. 215, 235.)

Absent monopoly, domination, indispensability or coercion—it is not unlawful for men to organize a cooperative

for such "innocent" purposes or for them to keep the resulting "copy" for themselves.

That is what this court said in the *St. Louis Terminal* case quoted *supra* p. 13, that in the absence of monopoly the cooperative could have kept the terminal "for *their common* but *exclusive* use."—other companies might be admitted on terms or excluded altogether.

All technicalities aside—the purpose of this lawsuit is to take that copy away from the defendants and to *compel* them to share it with their competitors before they publish it themselves.

VI.

The right of a cooperative to keep their own product for their own use includes the right not to share the benefit of such use with competitors.

The court below did not decide this case against the defendants upon any theory of inadequacy of competition—or injury to competitors. It decided it upon the novel theory that the public policy of "full illumination"—so it thought—required the defendants to sacifice their proprietary interest in their own copy for the proposed benefit of the public.

The Government in its present brief has abandoned the special public-policy theory of the court below—or at least argues it so faintly that it can be regarded only as a makeweight. (See Govt. br., pp. 75-89).

The Government brief now relies upon another novel theory of interpreting the anti-trust laws—namely, the theory that there is something about cooperation that is so inherently unlawful—that if the members of a cooperative secure any "benefit"—any "competitive advantage" from their cooperation—they must share it with their competitors. This argument is repeated in varying forms (Govt.

br., pp. 56, 57-61, 67, 81)—but in substance it is the same throughout.

The position of the Government may be further illustrated by the statement in its brief, page 75:

> "The district court took a different view of the law, saying that 'a combination may be within its rights, although it operates to the prejudice of outsiders whom it excludes.'"

This theory of the Government again is a new interpretation of the anti-trust act. No court—so far as we are aware—has ever held that—absent monopoly—indispensability or coercion—the members of a cooperative must not only compete against others—but must actively aid competitors to compete against themselves.

1. The general rule.

In the passage from the *St. Louis Terminal* case—quoted above, page 13—this Court said that absent monopoly—the members of the terminal association could have kept their terminals

> *"for their common but exclusive use."*

This is exactly what the defendants contend here. They have a right to keep the "copy" they have created for their common but exclusive use.

It is against the first principles of free private enterprise that they should be compelled not only to compete—but to help their competitors compete against themselves.

The Government concedes that the by-law against supplying AP "copy" to non-members is entirely reasonable and lawful *per se** (Govt. br., p. 64). It says, however,

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* The court below so concluded (Conclusion of Law III, R. 2628). This Court in *INS* v. *Associated Press*, 248 U. S. 215, also said that this provision reflects "The practical needs and requirements of the business * * *" (p. 241).

that the AP members cannot even "consider" their own self-interest in admitting members.

This reservation nullifies the right of the members to keep their copy for themselves. It is basic that the right to cooperate includes the right to select one's own associates. *That is the essence of free, private enterprise as distinguished from public-utility enterprise.* What the Government is saying is that there cannot be a *private* cooperative news-gathering agency.

This is directly contrary to the opinion of the Attorney General referred to in the AP main brief (p. 52). The Attorney General—upon the direct complaint of a newspaper competitor—ruled as to the AP that:

> "• • • it is no violation of the Anti-Trust Act for a group of newspapers to form an association to collect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association; • • • . And if that is true the corollary must be true, namely, that newspapers desiring to form and maintain such an organization may determine who shall be and who shall not be their associates."

The court decisions holding that news-gathering agencies are not under obligation to supply their news to their competitors are collected in the AP main brief (pp. 83-87). Many additional cases involving other cooperatives are collected in the AP main brief (pp. 63-74). We draw the attention of the Court particularly to *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322. In that case the Court said:

> "It is established that the quotations are property and are entitled to the protection of the law, and that the Exchange 'has the right to keep the work which it has done, or paid for doing, to itself' " (p. 333).

In the same case this Court expressly defined the right of the Exchange as:

> "The right * * * to keep the quotations to itself or communicate them to others" (p. 338).

Again, in *Moore* v. *New York Cotton Exchange*, 270 U. S. 593—a case involving a cooperative with limited members—which distributed its price quotations only to members and other approved applicants—the lower court said:

> "* * * the Exchange is under no legal duty to sell its quotations to any particular person nor to all" (296 Fed., at 69).

This Court, in affirming, held that:

> "In furnishing the quotations to one and refusing to furnish them to another, the exchange is but exercising the ordinary right of a private vendor of news * * *" (270 U. S., at 605).

2. A cooperative — otherwise lawful — does not become unlawful merely because the members obtain some benefit—some competitive advantage—as the result of their own efforts.

The main contention of the Government brief, as previously shown, is that there is something so inherently wrong about cooperation—in whatever form—that it must never result in greater efficiency—or in any competitive advantage. If it does so the cooperators cannot keep the benefit for themselves but must share it with their competitors.

Cooperation, says the Government brief (p. 81), constitutes unlawful restraint of trade:

> "if they thereby attain an advantage over persons from whom the fruits of such joint action are withheld."

As we understand it, the contention is that cooperation —if it results in excellence—is illegal without more.

The Government on this point relies on excellence alone:

not monopoly
not indispensability
not coercion
but excellence alone

A competitor—may compete—and must compete. To compete is to struggle to excel.

But if any competitor does excel—then he violates the law. *His excellence is, per se, his condemnation.*

This is an egalitarian conception of the anti-trust laws which has never yet been accepted by this Court, although it has been advanced in other cases.

We cite the following—among other decisions—in which this egalitarian principle has been rejected.

The general rule—that the purpose of the anti-trust laws is not to level down competitors—is stated in the following cases:

Federal Trade Commission v. *Curtis Publishing Company*, 260 U. S. 568:

> "Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face" (p. 582).

Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 463:

> "The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with

> ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs" (pp. 475-6).

United States v. *United States Steel Corp.*, 251 U. S. 417:

> "Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining consideration, seems to conduct" (p. 450).

This general rule is applicable also in the case of cooperatives. A cooperative to produce something for the members' own use is not unlawful merely because the members get some good, *i. e.*, advantage, out of their cooperation which competing non-members may not enjoy.

In *United States* v. *Terminal Association of St. Louis*, 224 U. S. 383, this Court ruled that under the Sherman Act railroads could form an association to acquire terminals and—if they did not monopolize all terminal facilities—need not share the advantages of the association with competing railroads (see *supra*, p. 13).

In *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, this Court likewise ruled that under the Sherman Act coal producers could form an association to sell their coal—

and—if they did not monopolize the coal market—could enjoy the advantage of this association in competition with other sellers not members of the association:

> "A coöperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint * * *" (pp. 373-4).
>
> * * * * * * *
>
> "Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices" (p. 374).

Mid-West Theatres Co. v. *Co-Operative Theatres*, 43 F. Supp. 216 (E. D. Mich.).

The court in this case ruled that under the Sherman Act moving picture theatres could form an association to purchase film for them and—so long as they did not coerce outsiders or achieve a monopoly—could enjoy the advantages of this joint purchasing power in competition with a competing theatre owner who applied for admission in the association and was turned down:

> "Independent operators may organize for the reasonable promotion of their economic activity without violation of the Sherman law" (p. 221).

The Prairie Farmer Publishing Co. v. *The Indiana Farmer's Guide Publishing Co.*, 88 F. (2nd) 979 (C. C. A. 7th), certiorari denied 301 U. S. 696, rehearing denied 302 U. S. 773.

The court here held that under the Sherman Act newspapers could combine through an advertising agency in

offering low joint advertising rates even though this placed at a disadvantage a competing non-member newspaper:

> "Here, appellants, it seems to us, brought about a situation by agreement amongst themselves whereby in association they could reduce the cost of securing sustenance in the way of advertising in competition to a certain degree with national farm papers. What they sought in that respect was conducive to reduction of cost and to efficiency of operation of their businesses. Unfortunately, appellee was not in position to meet that competition; but that fact, it seems to us, is one of the fortunes of development of industrial practices, and its existence should not stamp with the stigma of illegality the act of appellants" (pp. 983-4).

The same principle has been applied in the case of stock and commodity exchanges. It is undoubtedly a benefit to the members to belong to such limited-membership organizations. They have not been obliged to share those benefits with non-members on that account—as the following cases show:

In *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, this Court held that the largest cooperative grain exchange in the world, whose membership was limited, did not violate the Sherman Act in gathering together price quotations and entering into contracts with telegraph companies which limited the advantages of the quotations to the members and certain other approved applicants:

> "* * * so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to anyone, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law" (p. 252).

In *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, this Court upheld the right of the New York Cotton Exchange, whose membership was limited, to restrict the distribution of its price quotations even though its purpose was to keep the advantages of these quotations from "bucket shop" competitors of Exchange members. The object of the Exchange was approvingly stated as:

> "• • • the control of the quotations by the Exchange and its protection from the competition of bucket shops • • •" (p. 336).

In *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, this Court ruled that under the Sherman Act the largest cotton exchange in the country, whose membership was limited, could deny the advantages of its price quotations to a competitive exchange:

> "In furnishing the quotations to one and refusing to furnish them to another, the exchange is but exercising the ordinary right of a private vendor of news or other property" (p. 605).

The same principle has also been applied in the cases involving cooperative news-gathering agencies. The complainants in those cases were, of course, competitors who had not been admitted to membership in the agencies in question. Those cases are discussed in the AP main brief in Point II, at page 79 *et seq.*

The majority of the court below in the present case did not adopt the principle for which the Government now contends. The majority opinion specifically stated the rule in the following language:

> "• • • a combination may be within its rights, although it operates to the prejudice of outsiders whom it excludes" (R. 2590).

If, as the Government contends, the rule which outlaws any "advantage" attained by cooperation is applicable not only to the press but to all other forms of enterprise as well, then the results could only be described as revolutionary.

If by cooperative action—in whatever form—the parties are able to increase their collective efficiency—then the result is that because of their efficiency, they violate the law. Such a rule would destroy all progress.

The very purpose of competition is to stimulate men to excel. But under this rule—if they do excel it avails them nothing—competitively; they must either dissolve or put themselves in a position where everything they do will benefit their competitors as much as it benefits themselves.

How such a rule could be applied in actual practice—it is impossible to imagine.

3. Cases cited by the Government.

The Government has not cited a single case in support of its theory that cooperation alone requires the sharing of any resulting benefit. In every case cited by the Government some additional element existed without which cooperation would not have been illegal.

In some of the cases the cooperators were attempting to coerce others or control their conduct—in other words, using predatory practices. In some of the cases the additional element was monopoly or indispensability. In not one single case was there any illegality—in the absence of one or more of these elements.

It is a new interpretation of the anti-trust laws—never before laid down—that the members of a cooperative to produce something for their own use must help their competitors compete against the members themselves.

We shall discuss the cases—cited by the Government—in the following sections of this brief.

VII.

The boycott and refusal-to-deal cases are irrelevant.

The Government has cited a large number of cases involving boycotts and refusals to deal. In every one of those cases—and the Government's own description shows it—the defendants refused to deal in order to drive someone else—a competitor—out of business, or to coerce someone. In every one of them, refusal to deal was being used as a *weapon* against others—to drive them out of business or to coerce their conduct.

AP is not seeking to coerce anyone. The Government brief admits (p. 69) that AP does not try to control the trade practices of others.

There is no boycott here—the AP members are not trying to coerce or control anyone. They are minding their own business.

They are merely taking the position that they are not required to put competitors in a position to use the AP copy—which they have created—against themselves.

These cases are set forth in the Government's brief, at pages 69-75. They may be summarized as follows, in the order cited:

(1) *Eastern States Retail Lumber Dealers Ass'n* v. *United States*, 234 U. S. 600. A combination of retail lumber dealers refused to deal with wholesalers selling at retail—*in order to compel them to cease selling at retail.*

(2) *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457. A combination of manufacturers refused to deal with retailers who pur-

chased from "pirate" manufacturers—*in order to force those manufacturers to cease "pirating" designs.*

(3) *Montague & Co.* v. *Lowry*, 193 U. S. 38. A "dominant" combination of tile dealers and manufacturers agreed not to sell to non-members except at an increased price—*in order to force non-members to become members as the price of being able "to transact their business as they had theretofore done"* (Gov't br., p. 71).

(4) *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501. A combination of bill-posters refused to deal with advertisers and lithographers doing business with other bill-posters—*in order to drive out of business those other bill-posters.*

(5) *Anderson* v. *Shipowners Association*, 272 U. S. 359. A combination of shipowners refused to hire seamen except through an association employment office at association fixed wages—*in order to control the employment of these seamen.*

(6) *Binderup* v. *Pathé Exchange*, 263 U. S. 291. A combination of film distributors refused to deal with an exhibitor—*in order to eliminate the trade of the exhibitor.*

(7) *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553. A combination of sugar refiners refused to deal with anyone who carried on both a warehouse and a brokerage business—*in order to compel him to choose which business he would carry on—this being part of a plan to fix prices.*

(8) *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30. A combination of film distributors refused to deal with exhibitors who would not sign a contract providing for compulsory arbitration—*in order to control the exhibitors.*

(9) *United States* v. *First National Pictures, Inc.*, 282 U. S. 44. A powerful combination of film distribu-

tors refused to deal with purchasers of theatres—*in order to compel them to assume the obligations of their predecessors.*

(10) *American Medical Ass'n* v. *United States,* 317 U. S. 519. A combination of physicians refused to deal with a cooperative health group and sought to induce hospitals similarly to refuse to deal—*in order to drive the health group out of business.*

(11) *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208. A combination of film distributors, at the request of an exhibitor, refused to deal with other exhibitors—*in order to control the manner in which the other exhibitors conducted their business.*

VIII.

The trade-association-statistics cases are irrelevant.

The Government brief (pp. 81-84) cites a number of price-fixing cases where trade associations, which had collected statistics, were required to make those statistics available to their customers. Those cases are clearly distinguishable on the following grounds:

(1) The customers were unable to obtain the same information themselves—as other papers and other news agencies do;

(2) The statistics were to be kept secret.

Thus, as this Court observed in the case of *Maple Flooring Manufacturers Ass'n* v. *United States,* 268 U. S. 563, 581, the information was "treated as confidential and concealed from the buyers."

(3) This gave the combination power to overreach their customers, as the Court said in *United States* v. *American Linseed Oil Co.,* 262 U. S. 371, at pages 389 and 390:

"[The producers] With intimate knowledge • • • went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions."

(4) The purpose was to fix prices and control production.

None of these reasons is applicable to AP because:

(1) Competitors have free access to the news events and the news is also available to them from other news-gathering agencies.

(2) The news is collected for the very purpose of publication.

(3) There is no purpose to deceive or overreach nonmembers.

(4) The value of news lies in *not* giving it to others until you have published it yourself.

IX.

The monopoly cases—such as the *St. Louis Terminal* case—are also irrelevant.

The Government brief (pp. 84-86, and again at pp. 124-125) seeks to apply to AP the precedent of *United States* v. *Terminal Railroad Ass'n*,* 224 U. S. 383. That case—as pointed out in the AP main brief (p. 65)—is a clear authority in favor of the defendants. It involved a cooperative organization to operate railroad terminals in the City of St. Louis. This Court stated in unequivocal terms that

* Similar situations existed in the lower court cases cited by the Government, following the *St. Louis Terminal* case, namely:

United States v. *Great Lakes Towing Co.*, 208 Fed. 733 (N. D. Ohio);

United States v. *New England Fish Exchange*, 258 Fed. 732 (D. Mass.);

United States v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.).

under ordinary circumstances such a cooperative organization would be lawful, that they might acquire terminals for their "*common but exclusive*" use—and that other companies might be "admitted on terms or excluded altogether" (224 U. S., at 405).

The basis of the Court's decision in that case was *monopoly* and *indispensability*. Because of the peculiar topographical conditions in the City of St. Louis, the combined terminal constituted the only means of access to that city and thereby gave the members of the cooperative power to exclude all other railroads altogether.

The purpose of the anti-trust laws is not to create public utilities nor to set up regulated monopolies. The only cases where decrees of that nature have been entered are cases where illegal monopoly already existed—and where there was no practical way that competition could be restored. Those cases are completely inapplicable here.

AP has no monopoly. It is not indispensable. It does not deprive non-member papers of access to the news—or of access to other competing agencies—and strong, active and adequate competing agencies have been formed and grown up since AP was organized—and are operating successfully today (*supra*, pp. 8-10).

The majority decision of the court below did not rest on monopoly or inadequacy of competition. It rested upon its novel doctrine of "full illumination". Judge Swan, in his dissenting opinion below, said with respect to the *St. Louis Terminal* case:

> "I do not regard the case as apposite to the situation at bar. As already pointed out, the Terminal Association had obtained a complete monopoly. But AP has no monopoly in news gathering" (R. 2605).

The Government brief (p. 77) and the Field brief (p. 10) claim that the tendency of the AP by-laws to create a

monopoly is shown by a "spontaneous" comment from Judge Brewer in *Minnesota Tribune Co.* v. *Associated Press*, 83 Fed. 350, 357—with regard to an earlier association—not the present AP.

That comment was made in 1897—47 years ago. It was a mere *dictum*, and—as the Government brief points out—was volunteered, without any discussion in the briefs or in the oral argument. It did not relate to the present AP. It is a striking illustration of the impropriety of attempting to reach conclusions of this character by *a priori* reasoning.

The evidence as to what has actually happened in the 47 years since that *dictum* shows that the *dictum* was completely wrong. The tendency has not been toward monopoly—but toward constantly increasing competition.

During those 47 years both UP and INS and all the other 30 or 40 news agencies have come into being, have grown up, and are flourishing today. AP, far from being a monopoly, faces powerful, able, and constantly increasing competition. Its own relative importance has steadily diminished.

During the period since Judge Brewer's *dictum*, the *Washington Times-Herald*—which failed of election to AP in 1914—has grown up to have the largest circulation of any paper in Washington (R. 1078, 1091, 1122, 1135; F. 83, R. 2618).

The St. Louis Star-Times—which failed of election to AP in 1901 (*State ex rel. The Star Publishing Company* v. *The Associated Press*, 159 Mo. 410 (1901))—has continued and flourished ever since, and has today a circulation of 164,000 (R. 1139).

The *New York Daily News*—without AP—attained the largest morning circulation of any paper in the United States (F. 75, R. 2616).

The *New York Journal*—without AP—grew to have the largest evening circulation of any paper in the United States (F. 77, R. 2617).

The *Baltimore Evening Sun* grew to be "one of the predominantly successful evening newspapers in the United States" (R. 1775).

The numerous *Hearst papers* rose to their great circulations—likewise without AP membership—during this same period (R. 1727).

The record is full of data as to many other papers—both large and small—which have grown up without AP—as set forth in the AP main brief, pp. 23-32.

It is obvious that the actual facts—as proved in this record—are not only more convincing than Judge Brewer's *a priori dictum*—they are absolutely conclusive to the contrary.

X.

A cooperative to produce something for the members' own use is not deprived of the right to select its own members on the theory that it is not a "unitary" organization.

The Government concedes that it is the right of a private trader to consider his own self-interest in selecting those with whom he will deal (Govt. br., p. 65).

It says, however, that a cooperative may not consider the self-interest of its members or of the organization as a whole in determining who shall be admitted to membership (see Govt. br., p. 67).

We contend that a cooperative—not otherwise unlawful—whose sole purpose is to produce something for the members' own use (in this case, "copy")—is a "unitary"

organization. The Government itself calls the AP a "joint undertaking" (Govt. br., pp. 11, 56), and that is exactly what it is.

The Government concedes elsewhere in its brief that the anti-trust law "aims at substance"—not at form. And in support of that, it quotes the language of the *Appalachian Coals* case, 288 U. S. 344, 377, where this Court expressly held that a cooperative—whose membership was limited—

> "* * * is not to be condemned because of the absence of corporate integration."

We have cited in the AP main brief, pp. 66-75, and in this brief, pp. 18-25, a very large number of cases to the effect that cooperatives have the right to select their own associates and to accept or reject members in accordance with their own judgment as to their own best interests.

These cases stand for the principle that a cooperative—otherwise lawful—may exercise the ordinary rights of other private enterprises.

AP is a "joint undertaking", a combination for "innocent purposes", as this Court has held.

It is not deprived of the normal incidents of private enterprise merely because of its cooperative form.

As we have said before, it is inconceivable that UP and INS should be permitted to consider their own self-interest and the interest of their subscribers in determining to whom they shall supply their "copy"—and on what conditions—because they are "unitary" organizations—but that AP should be deprived of the right to entertain similar considerations in the selection of its own members merely because it is a cooperative.

If that be the law, then UP and INS will certainly have great advantage over AP.

The Government brief (p. 100) *intimates that it may be intending to ask just that discriminatory application of the law.*

The Government's argument amounts to this. UP and INS can recognize the principle of exclusivity—the value of first and sole publication—the need of distinctive copy—so fundamental in the newspaper business. UP and INS can make contracts with their subscribers which will recognize that principle.

Mr. Field can sell the services of the Chicago Sun to sixty-nine other papers on an exclusive basis (R. 876), and he can buy the service of the New York Herald Tribune and other services on an exclusive basis (R. 856, 858; 867, 872, 873) because the Chicago Sun is a "unitary" structure.

But AP members are to be forbidden even to "consider" —in any degree—their own interest in having their own distinctive copy. Such discrimination would be monstrous.

XI.

AP is not a "conspiracy".

The Government brief suggests that AP is an unlawful "conspiracy" (p. 65).

Obviously, not all "combinations" are "conspiracies". There may be combinations for entirely "innocent" purposes.

Under well-settled principles, a "conspiracy" must be either

(a) a combination to accomplish an unlawful end by lawful means—or

(b) a combination to accomplish a lawful end by unlawful means.

Here, neither the end nor the means are unlawful. The purpose of AP—as this Court has said*—is "innocent".

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* 248 U. S. 215, at 235.

The means—a cooperative to create "copy" for the defendants' own use—is also "innocent".

Cooperation as a "weapon" to drive others out of business or otherwise control their conduct may become a conspiracy.

But—absent monopoly, indispensability or coercion—cooperation solely for the purpose of enabling the members to accomplish something that they could not accomplish individually—has never been held unlawful.

Moreover, in this case the cooperative form of organization has resulted in affirmative social benefit. The very virtues of the defendants should not be made a reason for their condemnation.

The defendants earnestly contend that the loss of the power to choose their own associates without fear of contempt proceedings would seriously affect the ability of AP to perform its function. If every applicant can come in as a matter of right, then the members will feel that AP is no longer their own. Its cooperative spirit—the willingness to make effort to serve, to make sacrifice and to undertake the responsibilities of management, on which its service now depends—will disappear. Its capacity to compete and to maintain the character and quality of the news report would be impaired.

XII.

The proprietary interest of the AP members in their own "copy" should not be sacrificed to the alleged public interest in "full illumination".

The Government brief (pp. 89-92) argues that the proprietary rights of the AP members must be sacrificed because of public policy in the dissemination of the news

with as many different "facets" as possible. This is the doctrine of "full illumination" adopted as the basis of its decision by the majority of the court below.

The Government brief carefully avoids any mention of the phrase "full illumination"—and supports the general point so half-heartedly that one cannot but infer that the *ratio decidendi* of the majority below has been, in fact, abandoned. The Government itself terms the point "unnecessary" (Govt. br., p. 89).

The argument on this point of public policy has already been fully developed in the AP main brief (pp. 33-42), and that argument has not been met by the Government brief. It is therefore unnecessary to repeat it here.

XIII.

Local and Canadian News.

The AP by-law providing that the members shall supply their local "spontaneous" news exclusively to AP—and the contract providing for the acquisition of Canadian news by AP from The Canadian Press—have already been sufficiently discussed in the AP main brief at pages 91-99.

We wish only to reiterate that neither of these arrangements is of any material competitive significance today.

The importance of the local news supplied by members has greatly declined because of the revolution in news gathering brought about by rapid communication and transportation—particularly the use of the telephone—and by reason of the fact that AP has established its own collecting agencies. Other leading agencies also offer comprehensive and fully adequate domestic and Canadian news, and have testified that neither the AP by-laws nor the Canadian

contract has prevented them from doing so (AP main brief, pp. 94-9).

The statement in the Government brief (p. 111) that there is no comparable news service out of Canada other than the news received by AP from Canadian Press overlooks the direct representation in Canada of UP through its subsidiary British United Press, and the direct representation in Canada of INS through its own representatives. (See AP main brief, pp. 98-9.)

The attempt of the Field brief (p. 4) to treat the AP by-law as to local spontaneous news as a major issue in this case is completely lacking in any sense of proportion. This by-law relates to a very limited class of news only—local "spontaneous news"—not news generally, news pictures, features or comics (AP main brief, pp. 93-5).

No academic reasoning can shake the fact that UP and INS (and other agencies in less degree) are successfully collecting and distributing complete, comprehensive and adequate local news. They so testified and their subscribers so testified. There they stand, and their mere existence is a refutation of the claim that the AP by-law deprives non-members of AP of comparable local news services.

Far from being a major issue in the case, the by-law that local spontaneous news be turned over exclusively to AP by its members has long ceased to have any substantial practical importance either to AP or to its competitors. It has been blown up into fictitious significance.

The Government does not contend that the by-law is wrong, except in so far as the requirement is exclusive.

Both this Court in the INS case, 248 U. S. 215, 230, 241, and the court below in the present case (Op., R. 2598) thought this by-law reasonably reflected the practical needs of the situation. But if this Court is now of the opinion that this is incorrect the remedy should be to cancel

the exclusive feature of the by-law and not to convert AP into a public utility.

These matters are of minor significance compared with the major issue in this case—namely, the right of AP to control its own membership and management—not only in its interest but in the interest of the public.

XIV.

The Government argument that the decree will not convert AP into a public utility—or require continuous supervision.

1. The public-utility argument

The Government brief (p. 122) argues that the decree will not result in imposing public-utility obligations upon AP—but will merely remove "discrimination" in the admission of members.

It neverthless cites and discusses the *St. Louis Terminal* case and similar cases in the lower courts where the defendants—having monopolized indispensable public-utility facilities—were compelled to deal with all comers on equal terms. These cases are *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 747 (D. C. N. D. Ohio); *United States* v. *New England Fish Exchange*, 258 Fed. 732, 752 (D. Mass.); *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.).

It artfully suggests that these cases stand for the proposition that a combination guilty of "illegal boycotting" may be subjected to injunctions:

> "• • • affirmative in form, requiring the defendants to deal on equal terms with those who had previously been excluded" (Govt. br., p. 123).

Now this is a very strange way to demonstrate that the purpose of the Government—and the purpose and effect of

the decree below—and the purpose of this whole litigation —are not to impose public-utility obligations.

The suggestion in reality is that AP should be affirmatively required to take in all applicants on equal terms.*

The Government brief also says (p. 123) that Judge Hand below said that the public-utility argument was a "red herring".

In fact, however, Judge Hand said exactly what we now say—that:

> "The effect of our judgment will be • • • to compel them [the AP members] to make their dispatches accessible to others" (R. 2600).

And he did this, referring to AP as:

> "• • • a combination which, though *bound to admit all on equal terms,* does not do so" (R. 2599).

And that obligation, according to Judge Hand, arises out of the fact that, because of the public interest in "full illumination":

> "• • • to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have • • • (R. 2595).

The dissenting Judge summed up the basis for the majority opinion as:

> "Solely the court's view that a news gathering organization as large and efficient as AP is *engaged in a public calling,* and so under a duty to admit 'all "qualified" applicants on equal terms'." (R. 2602).

To the ordinary user of English speech, this can only mean that AP is to be subjected to public-utility obligations.

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* For other similar suggestions in the Government brief, see *supra,* pp. 6-7.

Once the defendants are submitted to the public-utility principles for which the Government argues and which the court below laid down—then from that time on, the Government and private individuals as well—will contend that that principle means exactly what it says.

Make no mistake—if the defendants are once submitted to a decree under any of the theories advocated by the Government—their hand is in the wringer and everybody knows it.

Let us test the soundness of the argument that the Government asks only that the defendants be enjoined from "*discrimination*".

The decree below strikes down in their entirety the provisions of the AP by-laws for admission. Suppose that AP said "We accept that injunction—from now on we will have no by-law for admission and will admit no one." The Government certainly would not be satisfied with that. It would immediately move against AP on the ground that its action was an evasion of the holding of the court below. It would also move—under the reservation in the judgment with respect to applications by either party to "modify" the decree—to have the decree strengthened—as in its third assignment of error.

Moreover, it would also point out that while the court below held that the AP by-law against disclosure of the AP "copy" to non-members is not unlawful *per se*, it has, nevertheless, been enjoined until by-laws satisfactory to the court are adopted (R. 2631-2). Obviously, this is a device for the express purpose of compelling AP to adopt by-laws which will admit all applicants on equal terms.

The obligation to deal with all applicants on equal or "reasonable" terms is the obligation of a public utility. There can be no possible dispute about that.

It makes no difference whether that obligation is imposed by common law or under the guise of an interpretation of the antitrust act. It is a public-utility obligation in either case—and the consequences are the same.

It is extraordinary that a statute intended to promote competition should be turned into an instrumentality for the creation of regulated monopoly.

But regulated monopoly—the imposition of public-utility obligations—seems to be the favorite remedy asked by the Department of Justice in antitrust cases recently—as in the Bausch & Lomb case[1]—the Hartford-Empire case[2]—the case against du Pont and British Imperial Chemicals[3]—the Pullman case[4]—the Alkali Export Association case[5]—and others.

If that should become the standard remedy in cases under the antitrust act—it is obvious that this Court will be called upon to assume administrative functions of extraordinary character—which courts are ill-equipped to assume. The Interstate Commerce Commission deals only with carriers — the Federal Communications Commission deals with communications—the Federal Power Commission deals only with power. But this Court will be called upon to administer the fulfillment of public-utility obligations covering conditions in many different industries—including industries which are not routine in character—industries which do not deal in standardized articles—and for which precedents established in truly public-utility cases would be completely inadequate as guides.

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[1] 321 U. S. 707.
[2] Nos. 2-11 October Term U. S. Supreme Court, 1944.
[3] S. D. N. Y. Civ. 24-13 January 6, 1944.
[4] 50 F. Supp. 123 (E. D. Pa.).
[5] S. D. N. Y. Cir. 24-464 March 16, 1944.

2. Continuing supervision.

Obviously the obligation to admit members on equal terms means what it says. The new members must be put on an equality, not only with each other but also with the presently existing members.

But, as we have already pointed out in the AP main brief, equality is not equity, and very complex and perplexing questions will necessarily be presented (AP main br., pp. 87-90).

It is utterly unrealistic to say—as the Government brief says (p. 128):

> "The judgment does not, directly or indirectly, touch upon the quantity or quality of service to be furnished by AP to its various members or the rates to be paid for such service."

Those are exactly the questions which the court would have to pass upon in order to make sure that members were being admitted on "equal terms".* And if any disgruntled member felt put upon, the court would certainly hear of it.

To show how certain it is that these questions as to rates and service would be subjected to Government supervision, we have only to point to the Government's brief (p. 99) where there is an intimation that there is something improper about the method of computing assessments, in that the practice has been:

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* In the *St. Louis Terminal* case, the holding was that the terms of admission must be such as "shall place such applying company upon *a plane of equality* in respect of benefits and burdens *with the present proprietary companies.*" (Govt. br., p. 124.)

The Government brief (p. 85) also quotes from the decision of *United States* v. *New England Fish Exchange*, 258 Fed. 732 (D. Mass.), to the effect that the proper relief in such monopoly cases is to require the admission of outsiders "upon equal and *reasonable* terms."

> "• • • up to the present to allocate expense to a city and field and to divide such allocation among the members therein, irrespective of their number."

Moreover, the Field brief filed as *amicus curiae* asks that this Court specifically declare that AP shall be affirmatively required to take in every applicant unless such applicant shall be excluded "for cause" (F. br., p. 19).

This would require the court in every case to decide what constitutes a "reasonable" cause for exclusion—for example, what degree of failure to conform to proper journalistic standards would justify exclusion; to what extent could AP consider, if at all, the question whether admission of a particular applicant would in any way be of benefit or detriment to AP as a whole; or what degree of distortion of the news reports would justify expulsion and continuing exclusion.

In practical effect this would mean that every decision as to inclusion and exclusion by AP would be only *prima facie*—the ultimate decision being for the court.

The Field brief also brings out still another subject for continuing supervision—and one inherent in the decree itself and in the Government's Assignment of Error No. 3. It says that membership should not be denied to:

> "newspapers (as distinguished, for example, from racing sheets or purely advertising media such as shopping information) • • •" (Field br., p. 19).

That means that in every case the question whether a particular applicant is really a "newspaper" will be for the courts to determine. Applicants will ask why that section of the public which is interested in horses—or in bargain sales—should be deprived of other news as well. They will

claim that the very fact that they desire to print news shows that they are a newspaper.

Every conceivable publication which prints news may claim to be a newspaper—and demand that its wants be served by an appropriate class of service at appropriate and reasonable rates.

Neither is it realistic to say, as does the Government brief (p. 128), that the court will not have:

> "• • • to exercise continuing supervision over the relationship between the members even after they have been admitted."

Certainly, the court would not allow AP to admit a member and then treat him in a discriminatory manner after admission. If there is any such thing as an obligation to treat everyone on "equal terms" or "reasonable terms"—it must survive admission. The members will have just as much right to demand equality of treatment between themselves as non-members have to demand equality of treatment with pre-existing members.

Mr. Justice Brandeis saw as clearly as do these defendants the inevitable consequences of the principles for which the Government contends. He said in his dissenting opinion in *International News Service* v. *Associated Press*, 248 U. S. 215, that if the gathering of news should ever be deemed affected with a public interest the courts would be powerless:

> "to prescribe *the detailed regulations essential* to the full enjoyment of the rights conferred or to introduce *the machinery required* for the enforcement of such regulations (p. 267)."

XV.

Freedom of the Press.

The Government contends that nothing that it asks has any "semblance" of interference with freedom of the press (br., p. 131).

Regardless of disavowals—and regardless of technicalities of language—this case is intended to impose upon The Associated Press obligations which in substance are public-utility obligations.

It is intended to put The Associated Press under obligations—which are of a discriminatory character—not applicable to other industries "of the ordinary kind"—and applicable to the press *because it is the press* (Op., R. 2594-6).

The press will necessarily be subject to vague and incomprehensible obligations which will involve continuing and complex supervision.

The one industry which is expressly guaranteed freedom in the Constitution—the one industry which is expressly put in "a preferred position"—is now put in leading strings on the ground that it is necessary for its own "protection" and the protection of the public interest (Op., R. 2595).

This is no question of general law regulating wages, hours of labor, and relationship with labor unions—such as was involved in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, on which the Government relies.

That case did involve a "clear and present danger"—the danger of serious and far-reaching labor disorders which might gravely threaten industrial peace. That was the danger — since amply demonstrated — which this Court pointed out in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 549-553, cited in the Government brief, pages 126-127.

Moreover, the public policy embodied in that labor case came before this Court:

> "encased in the armor wrought by prior legislative deliberation."

That is the expressive language used by this Court in *Bridges* v. *California*, 314 U. S. 252, at 261, where it pointed out the absence of such a legislative declaration of policy—and dismissed the prosecution of a newspaper for contempt.

Here, as in the *Bridges* case, there has been no "legislative deliberation" that public policy or the public interest requires that the press should be transferred from the field of free, private enterprise to the status of a regulated public utility—or that it should otherwise be put in leading strings or stripped of its proprietary interest in the "fruits" of its own efforts.

Congress has declared no such policy, and we venture to assert that Congress would not declare such a policy.

It is this Court which is being asked to declare the policy that The Associated Press not only may be—but should be and must be—subjected to regulation of the character which this case involves.

We submit again that the public policy which underlies the First Amendment is that so far as possible the press should be left free. If regulated at all, it should be only for reasons of the gravest necessity.

Such regulation should be imposed, if at all—not by the courts—but only by Congress itself.

The present case involves no question of monopoly—of domination—of indispensability—of power over others—or inadequacy of competition. It involves a nebulous and exceedingly controversial public policy unsupported by law or by the record in this case—and in direct conflict with the public policy embodied in the First Amendment.

Freedom of the press has been extinguished in practically all other countries. There are tides flowing which elsewhere have proved irresistible. We believe profoundly that there are lessons to be learned from what has happened universally throughout the world. We believe—as this Court has said in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, at 641—that

> "• • • the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

Conclusion.

The decision below should be reversed and the case dismissed.

Respectfully submitted,

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November 25, 1944.

Appendix.

Controverted Issues of Fact.

In the course of its argument the Government brief relies upon certain factual premises. These premises are exceedingly controversial. They cannot be assumed—or even decided on the basis of the weight of the available evidence—in a motion for summary judgment. They present disputed, triable issues of fact.

We have referred to one of these factual issues—the issue of monopoly—*supra*, page 8.

There are a number of other issues, however, which we shall discuss in this Appendix. It is our view that the issues of law are so clear that it is unnecessary that these controversial issues be considered by the Court. For the convenience of the Court, however, we attach a further discussion of some of these controversial factual questions.

1. Alleged Benefits and Advantages from AP Membership.

The Government repeatedly asserts throughout its brief that non-members are at a "disadvantage" (pp. 48, 61, 81).

The court below made no finding as to any such disadvantage.

The court did not even find that AP service was the best—saying that this was a matter in dispute (R. 2585).

It found that many papers have grown up and are flourishing without the service of AP (F. 75-83, R. 2616-18). There is not a single instance in the record showing that lack of AP membership has ever:

—prevented the starting of a single newspaper;

—prevented the successful operation of a single newspaper;

—caused the discontinuance of a single newspaper.

Obviously a paper which has the benefit of AP service—or of UP or INS service—has an advantage over a paper—

if any—which has no news-agency service at all. But here the record shows no such disadvantaged newspaper. It shows instead that:

(1) there are available two other news services which —as the court below specifically found—are "comparable in size, scope of coverage and efficiency" with AP (F. 36, R. 2611);

(2) there are from 20 to 30 other news agencies offering substantial news-reporting services, a number of which could be expanded to provide similar comparable services if there were any need therefor (AP main brief, pp. 20-22).

The affidavits of editors of non-AP papers set forth the comprehensiveness and adequacy of the service they are receiving elsewhere (see AP main brief, pp. 23-32). Affidavits of non-AP agencies—such as UP and INS—are to the same effect (R. 1475-1561; 1561-1610; 1611-1614; 1615-1660; 1661-1663).

Competition is strong, determined, effective and increasing—and the relative position of AP has been steadily diminishing.

The Government refers to the fact that the Washington Times-Herald failed of election to AP membership as far back as 1914. This was just before the Attorney General rendered his opinion that it was entirely lawful for AP, as a cooperative news-gathering agency, to choose its own associates as it saw fit.

Nevertheless, the Washington Times-Herald has grown steadily, and sells more papers today than any other newspaper in Washington (R. 1078, 1091, 1122, 1135; F. 83, R. 2618).

The Government says that AP is the most "popular." But the defendants say that hundreds of papers show their

preference for UP by choosing UP as their only agency although they are located in communities where there is no AP member and are actively sought as members of AP (R. 1908-30).

No "Unique" Value.

One of the principal claims made is that the AP news reports have a *"unique value"* because of their freedom from bias (Govt. br., p. 86; see also Field br., p. 7). There is nothing whatever in the record to show that the AP news reports are *"unique"* in this regard.

In support of this claim, both the Government brief (p. 86) and the Field brief (p. 7) rely upon the statement in the Complaint (R. 18)—which was admitted by the Answer (R. 119)—that the AP form of organization is an invaluable guarantee that:

> "the promise and claim made by *each* news-agency—that it presents the news without any political or sectional bias—will in fact be fulfilled."

That merely means that AP has been instrumental in keeping up high standards of reporting by *all* the agencies. It is impossible to use that as any evidence whatever—much less as undisputed proof—that the other agencies distribute "biased" news. There is no charge that they do so. There is no evidence that they do so. The court made no finding that they do so.

It is impossible for either the Government or Field to rest their case—in this proceeding for summary judgment—upon an innuendo—which is not only disputed but contrary to the record—to the effect that the other news agencies do not provide objective, unbiased news reporting.

The United Press prides itself upon its lack of bias. It advertises:

> "United Press prides itself on the fact that its key men everywhere are trained in the best traditions of American journalism. Their working creed is accuracy and impartiality" (R. 1557; see also 1558 E).

Mr. Williams, the General Business Manager of UP, testified (R. 1482):

> "UP news service is accurate, non-partisan and comprehensive."

The *Chicago Sun* has never claimed that the news it publishes—derived from UP—is biased news. On the contrary, it advertises itself as "**Chicago Morning Truth-paper**" (R. 924). It advertises that it is

> "• • • equipped to deliver the news accurately, fairly and first-in-a-crisis" (R. 937).

It advertises:

> "Chicago Morning Newspaper Readers Wanted
> Uncolored Financial Facts
>
> And day by day The Sun delivered them • • • Especially Facts about Legislation and Industrial Trends" (R. 950).

The fact that all of the leading agencies treat the news objectively—without bias—is also shown by the following testimony of Mr. Ellsworth (R. 1799):

> "I cannot agree with the premise apparently taken by Mr. Lee that the various wire services represent different shades of thought, and carry in their daily news report different interpretations or colorings of news events. News may be consid ed. a product of known ingredients, the ingredients being the plain facts of events as they transpire. Whether this product is furnished by the United

Press, the International News Service, Trans-Radio Press, or the Associated Press, the ingredients are the same. The American style of news writing now in use is not only taught in schools of journalism, but is generally used by all news men who write straight news.

* * * * * *

"The straight news is written objectively and without regard to interests involved. The facts are set forth with such amplification as deemed necessary in accurate and complete reporting (R. 1800).

* * * * * *

"* * * It is a fact which may be verified by anyone who will take the trouble to purchase all of the papers published in his city on any given date that, so far as the straight news is concerned, there is very little difference in the selection and version of the news facts presented by the several papers" (R. 1802).

Circulation and Advertising.

The allegation in the Government Complaint that the ability of a newspaper to publish AP news is an important factor in winning and retaining reader acceptance (R. 19) was denied in the AP Answer (R. 126).

The affidavit of Mr. Williams, the Manager of UP, denies that readers prefer or demand AP news (R. 1483).

The affidavit of Mr. James S. Short, of the famous J. Walter Thompson Advertising Company, shows that the national advertising agencies do not take into consideration what press service is subscribed to by a newspaper in placing their advertising (R. 1694-5).

The advertising by *The Chicago Sun* itself shows that without AP it has been extraordinarily successful in increasing both advertising and circulation (*infra*, pp. 61-4).

The evidence of many other non-AP papers quoted or referred to in the AP main brief (pp. 23-32) also shows that lack of AP membership has not prevented them from obtaining superior circulation and advertising lineage in competition with AP papers.

The largest morning circulation and the largest evening circulation in the country were both achieved without AP (*supra*, pp. 32-3).

The Government says (br., p. 36) that no large paper relies solely upon INS. But the affidavit of Mr. Gortatowsky, the General Manager of the Hearst newspapers, states (R. 1727):

> "The history of Hearst newspapers throughout the country demonstrates that newspapers can be and have been published with outstanding success as to circulation, advertising lineage and profit both with the use of the news reports of International News Service alone and with the use of the news reports of one or more news agencies other than The Associated Press.
>
> "Specifically, the history of Hearst newspapers demonstrates that newspapers without membership in The Associated Press have been and can be published with success."

Financial Resources.

It is argued that in some obscure way AP has an advantage because it has greater "financial resources" and more "funds" through the potential backing of its members. (Field brief, p. 6; Government brief, p. 97.)

There is no showing that UP or INS—or any of the other agencies—has ever been in the slightest degree hampered by any lack of sufficient funds. The annual operating expenses of all three of the leading agencies, including their affiliated services, are in substantially the same order of

magnitude: $11,305,000 for AP—$10,033,000 for UP—$9,434,000 for INS. (F. 19, R. 2609; F. 50, R. 2613; F. 64, R. 2615.)

AP's tangible assets are $7,000,000—a substantial but not extraordinary sum under modern conditions (F. 20, R. 2609).

The capital of the other agencies does not appear—but there is no reason to suppose that they are in any degree over-awed by the financial resources of AP.

Vast and "Intricately Reticulated" Service.

We have shown above that, financially, the other leading agencies are in the same order of magnitude as AP.

The other agencies are also "intricately reticulated." UP has more subscribers (including foreign papers) than AP has members (AP main br., p. 17), and claims to be "the largest and most far-reaching news service in the world" (R. 1556-A).

Any agency which purports to give a comprehensive world-wide service to a large number of widely scattered papers is naturally both large and reticulated. UP, for example, serves 65% in circulation of all the papers in the United States and a very large number of papers abroad—with all the appropriate wire, cable and radio network connections.

AP is not peculiar in this respect and deserves neither praise nor blame because of characteristics inherent in the business.

Daily Wordage.

The Government refers to the fact that the number of words sent out by AP each day is greater than that of other agencies.

UP, on the other hand, sends out 750,000 words a day (R. 1481) and both UP and INS claim that their services

are less wordy, more compact, and emphasize quality, not quantity. Any one of the three leading agencies sends out more words by far than any paper can possibly use.

Also, it is not clear to what extent the larger wordage of AP is not the result of the fact that it serves a larger number of domestic papers. The number of words in the daily service to an AP morning paper in Chicago, for example, was shown to be substantially the same as the number of words sent by UP to one of its morning subscribers in Chicago—273,000 AP, and 264,000 UP (R. 2040).

Foreign News.

All the agencies—including AP—are dependent primarily upon their own direct representatives for foreign news. There is no evidence that AP has any better foreign news than either of the other leading agencies. UP has excellent foreign news (R. 1478-1481, 1558). INS strongly insists upon the superiority of its foreign news, claiming that it uses the highest paid and most famous reporters obtainable (R. 2111). The New York Times makes extraordinary efforts to secure foreign news and its reports are made available to other papers (R. 2087-9). The Chicago Sun itself advertises that:

> "The Sun's foreign staff is one of the best in the world today!" (R. 945).

Domestic News.

The comprehensiveness and adequacy of the other domestic news services generally have already been discussed both in this brief at pages 8-10 and in the AP main brief at pages 18-22. We shall not repeat that full discussion here. We shall only point out briefly that from 60 to 75% of the entire general domestic news originates in Wash-

ington (R. 2210). All the news services—and hundreds of individual newspapers—maintain their own reporting staffs in Washington (R. 1897-1905).

Other domestic news of general importance is covered by direct representatives of the agencies. To cover other domestic news of general importance, all of the leading agencies have their own bureaus at the principal sources of the news and in addition have their own reporters or string men, located throughout the country.

Representatives of both UP and INS—and all the newspapers who subscribe for their services—have testified or given affidavits in this record that the domestic coverage of these agencies is comprehensive, prompt and fully adequate.

The court below found their services comparable with those of AP "in size, scope of coverage and efficiency" (F. 36, R. 2610-11). The Government has not assigned error to that finding and is bound by it.

News Pictures.

The Government brief says, page 40, that AP:

> "* * * has the only network of news photo wire transmission regularly maintained and transcontinental in character."

There is no showing, however, that the AP news picture service is superior on that account.

UP has an affiliate—Acme Newspictures, Inc.—which also furnishes transcontinental picture service by wire.

INS likewise has an affiliate—International News Photos (INP)—which maintains a country-wide news picture wire transmission service.

Both Acme and INP are large producers of news pictures.

In fact Acme and NEA Service, of which it is a subsidiary, rendered picture service to 1,060 newspapers in 1942, while only 749 papers received the picture service of AP (R. 1575; 686).

The facilities for the transmission of pictures—telephone, telegraph, radio and cable—are public utilities and available to all on an equal basis.

The evidence shows that there is no substantial difference in the quality of the pictures resulting from the Acme method as compared with the AP method, and that the Acme system is less expensive (R. 1565-6). Parity in quality was also proved visually by actual reproductions of the same pictures as sent by both methods (R. 1594-1609).

The President of King Features Syndicate—of which INP is a department—also testified that there is no material difference in the legibility of the reproductions of pictures transmitted by INP and those by AP (R. 2132-3).

INP has a regular staff of 150 employees, and maintains string photographers in practically every town of the United States (R. 2131). It probably has the most extensive picture "morgue" in the world, with a collection of over 1,000,000 pictures (R. 2131-2).

Acme likewise has a news picture library, or "morgue", of more than 1,000,000 pictures (R. 1568).

The facilities of AP, Acme, and INP for transmitting by wire have substantially the same speed of delivery. In fact Acme claims that it transmits pictures in seven minutes from Coast to Coast (R. 1564)—against AP's claim of eight minutes (R. 363).

Certainly the question whether non-members of AP are at any "disadvantage" with regard to news picture services is not one which can be assumed upon a motion for summary judgment.

Features and Comics.

So far as features are concerned, the record shows that the Government itself concedes that the features supplied by others are as good as or better than those supplied by AP (R. 973).

So far as comics are concerned—and they are exceedingly important—the testimony is that AP is distinctly inferior (R. 2198, 2201, 2134).

The Government brief mentioned in a footnote (p. 37) the "puffing" advertisement put out by a subsidiary of AP (R. 223). On the other hand, similar "puffing" advertisements by UP may be found in the record at pages 1556 A-1558 H.

No "Privileged Class".

There is something surrealistic about the picture of Mr. Field being excluded from "a privileged class" (Field brief, p. 11).

There is no privileged class in journalism.

Non-members of AP have available other comparable services.

The Field brief, p. 12, complains that the Chicago Sun is under-privileged because it is not permitted to take AP in addition to its other agencies for *checking* purposes. This complaint is without substance. The Chicago Sun already takes *five* other services—including UP—for checking purposes. It is also able to check against the AP dispatches themselves appearing earlier in the day in cities east of Chicago and also in the first edition of its principal morning competitor in Chicago—which appears at 6:20 P. M. each evening (R. 2004).

Mr. Field also claims under-privilege because the Sun does not have a *"choice"* between the AP stories and the stories of the same events supplied by its five other agencies —including UP.

The Chicago Tribune—the Sun's largest competitor in Chicago—has only one of the three leading services. It takes only AP—not UP or INS (R. 1311).

Apparently Mr. Field's argument is that he should have everything that any other paper has—and the mere fact that any competitor has a distinctive news report that Mr. Field does not have constitutes a violation of the law.

Mr. Field's position is simply this—that no news service should be permitted to sell, and no newspaper should be permitted to buy, exclusive or distinctive copy. But unless different papers can have different copy, there is no real reason for their separate existence. The adoption of any such principle—far from increasing newspaper competition—would be simply to cut down still further the number of newspapers in the United States. The public would not support a multiplicity of papers all publishing the same thing.

This complaint against any recognition by AP of the need for distinctive copy comes with particular ill-grace from Mr. Field—since the Sun both buys and sells copy on an exclusive basis. (*Infra*, p. 71.)

Mr. Field in his brief (pp. 8-9, 11-12, 15) and Professor Chafee in the newspaper article quoted therein (p. 15) seem to intimate that a newspaper without AP leads an anemic "unhealthy" and under-"privileged" existence.

Let us test whether this lies within the realm of undisputed fact—by comparing it with the statements made in the Chicago Sun—under other circumstances—in a continuous barrage of advertisements.

The advertisements in the Chicago Sun not only deny that its service is inferior. They claim—in no uncertain terms—superiority in every department—that its record is one of uninterrupted and triumphant success—viz.,

Comprehensive news

"The Sun is giving Chicago *more news than it ever had before in a morning paper*" (R. 1342).

"*Complete News Coverage*" (R. 1329).

Fast news

"This newspaper has consistently, day after day, scooped the competition on important news stories, international, national, state, local. These stories are matters of record" (R. 2501).

"*First* with the News of First Importance!" (R. 1334).

War news

"Sun readers are truly afforded *the best* in War news coverage" (R. 1328).

"Wherever there is action in the Pacific, Chicago Sun readers can count on receiving *the latest news first*" (R. 1328).

"Accurate, *complete* War News • • • The Sun's own Foreign Staff • • • United Press Service • • • Herald-Tribune Wire Service • • • *plus* everyday *excellence in local and national news reporting*" (R. 1329).

Foreign news

"The Sunday Sun offers its readers complete coverage of the news • • • local • • • national • • • world-wide • • •" (R. 1342).

"Complete News Coverage from our staff of feature writers and correspondents. News from the world of places and events. From Washington—from London—from Springfield—and from around the corner • • •" (R. 1341).

Washington news

"*No other Chicago newspaper can touch The Sun's Washington coverage* • • •" (R. 1343).

"• • • more important news first, more exclusive news, more Washington news, more news beats, big and little" (R. 1342).

Domestic news

"Accurate, *complete* coverage of national and *local* news" (R. 1341).

"All this in addition to complete coverage of latest war news, activities at home and abroad" (R. 1342).

Sports news

"The Midwest's *Most Complete* Sport Section" (R. 1351).

Impartial news

"But The Sun's service to Chicago, and strength in Chicago, lies in its news service • • • independent and impartial presentation of all the news of public interest" (R. 1342).

Exclusive news

"• • • the Sun has consistently delivered to its readers a large number of exclusive local, national, and foreign news stories. In fact, The Sun has regularly given its readers more news for their money than any other Chicago paper, and more than all but three papers in America: The New York Times, New York Herald Tribune, and Philadelphia Inquirer" (R. 937).

Abundant news

"According to Media Records, The Sun has consistently given its readers more for their money—more lines of news than any other Chicago paper; in

fact, more than any other paper in the country except the Times and Herald Tribune in New York and the Inquirer in Philadelphia" (R. 908).

"The Sun prints more lines of news matter every day than any other Chicago newspaper—as a matter of fact more than any other paper in the country except three" (R. 911).

Opportunity

"The field was open to establish a second successful morning newspaper in Chicago * * *" (R. 951).

Circulation

"The Sun's circulation record stands alone in the history of American publishing. No other American newspaper has ever won and held so many readers during its first year of publication, not even The New York Daily News . . . circulation giant of the newspaper business" (R. 913).

"Today one out of every three morning newspaper readers in Chicago and immediate suburbs reads The Sun" (R. 911).

"The Sun stands eleventh in circulation among all U. S. daily morning papers, and eighth among full-sized morning papers" (R. 913).

Advertising

"The Sun's phenomenal advertising success!" (R. 906A).

"Advertisers have been quicker to place their stamp of approval on the Sun than on any other newspaper in the history of publishing" (R. 909).

"As of October 21st, 513 local advertisers, 904 national advertisers, 268 advertising agencies and thousands of classified advertisers have already shown their confidence in the Sun by placing in it a

total of 6,702,617 lines of advertising in less than eleven months" (R. 909-10).

Success

"THE SUN ACCOMPLISHED MORE IN ITS FIRST YEAR * * * in building circulation, influence, and advertising lineage * * * THAN ANY NEWSPAPER EVER DID SINCE THE BILL OF RIGHTS ESTABLISHED FREE AMERICAN JOURNALISM IN 1789!" (R. 916).

2. Sporadic Local Situations.

The Government brief (p. 42) refers to the fact that in a small number of communities a single paper—or the only paper in a particular field—or several papers under one ownership or management—were taking the services of all three of the leading agencies.

There is no showing as to the circumstances under which these unusual local situations came about.

There is certainly no showing that AP itself brought them about or had anything to do with creating them. AP is not responsible for the acts of individual newspaper owners in their own communities. Moreover, the Government has not shown a single instance in which these situations have prevented any new paper from obtaining service.

These sporadic and incidental situations—for which AP is not shown to have any responsibility whatever—cannot be used as a justification for the drastic regulation of AP as a whole which the Government is asking in this case.

If any relief is necessary, it should be directed—in appropriate proceedings—to those local situations themselves.

3. Decline in Number of Newspapers.

The Government brief, page 49, states that the "number of newspapers has been steadily declining"—in such a manner as to give rise to the inference that this was due to non-membership in AP.

There is not a scintilla of evidence in the record that AP, by reason of its membership provisions or otherwise, is in any way responsible for the decline in the number of papers.

This decline has not been very great—only about 12% during the period from 1920 to 1942 (Govt. br., p. 43). This decline has not resulted in any decline in competition. On the contrary, it has been accompanied by more intense competition—between better papers and with larger circulation, and—because of improved transportation—circulating far and wide over considerable geographical areas.

The record does show that that decline is due to economic reasons (Noyes, R. 1430; Cross, R. 1691-2),—and a special survey made by the United States Department of Labor, entitled *Small Daily Newspapers under the Fair Labor Standards Act*, U. S. Department of Labor, Wage and Hour Division, Economics Branch, June 1942, supports that conclusion.

In brief, that decline was due to the following factors:

—Rising public standards, resulting in the demand for a better paper, with wider coverage of different public interests—which increased costs and required greater circulation.

—Competition between such better papers and papers of the old type which do not offer such comprehensive service.

—Improvement in transportation, so that papers printed in other communities can be delivered over

wide areas simultaneously with the delivery of papers published locally.

—The unwillingness of advertisers to advertise in a multiplicity of papers.

—The withdrawal of financial support by political parties.

On these points the Department of Labor report referred to above contains the following:

"Out of the newspaper publishers' efforts to maximize advertising revenue, and to gain the circulation which can enable them to do so, there has arisen *intense competition between the publishers of large and small papers—indeed between publishers of papers of all sizes* (p. 15).

• • • • • • • •

"The big city newspaper can now be distributed quickly over a much larger area than it was several decades ago (p. 15).

• • • • • • •

"Another reason for the consolidation of different newspapers and for the resultant growth in the number of one-paper towns has been *the disappearance of political affiliation in newspapers.* At the turn of the century it was the rule for each town of any consequence to have at least one Democratic and one Republican paper, even though the community were economically incapable of supporting two or more duplicate newspaper establishments. These papers *were supported to a considerable extent by political advertising sold at 'two to four times the commercial rate,' and often by direct subsidies from party funds.* With a decline in political support, numbers of these duplicate newspapers have been forced to discontinue operations, or to seek new fields for their endeavors (p. 24).

• • • • • • •

"In summation, *the industrial era has brought with it a larger, more up-to-date, and more pretentious small town paper.* The publisher, to meet increasing competition both at home and from abroad, has had to expand his plant, improve his news-gathering facilities, and make his paper larger and more attractive, at the same time that his production *costs have been steadily rising.* Many papers have been unable to keep pace and have suspended operations or have consolidated with other papers" (p. 26).

(See, to the same effect, the affidavits of Noyes, R. 1430; Clark, R. 1740; Todd, R. 1845; Cross, R. 1691-2; Hanway, R. 1811.)

The Field brief (p. 15) quotes from an article in the *Providence Sunday Journal* by Professor Chafee as indicating "the unhealthy condition in cities in which there is but a single newspaper." The quoted passage—on its face—is based upon the completely erroneous conception that AP membership is necessary to start a new paper in such cities—and the further misconception that AP supplies "abundant news," while other services—such as UP and INS—do not.

The fact is—as shown in the AP main brief, pp. 18-20—both UP and INS supply comprehensive, comparable and adequate news services. Hundreds of newspapers use only UP—and use UP by preference. There is not the slightest ground to argue that anyone who wants to start a paper in a town that has only one paper is prevented from doing so by not having AP membership.

There is no evidence whatever that lack of AP service has ever prevented the starting of a single paper or prevented the success of a single paper.

As testified by Mr. Ellsworth:

"In any consolidated field now served by only one newspaper, it is entirely possible for a competitor

to begin the publication of a daily newspaper there. The least of the problems he faces when contemplating such a venture is the question of a wire news service (R. 1803).

* * * * * *

"As a practical newspaperman with many years' experience in publishing a small daily newspaper, I know that the organization and operation of the Associated Press has had nothing whatever to do with the trend toward local non-competitive daily newspaper situations, * * * . I also know that some other adequate wire service may be obtained, and that, therefore, the Associated Press cannot be considered a restraint to free competition in the daily newspaper publishing business" (R. 1803-4).

4. Alleged Injury to the Public Interest from Denial of Membership to AP Competitors.

The public interest to which the Government refers (pp. 49, 89-92) is the doctrine of "full illumination" referred to in the majority opinion below.

The Government brief carefully — self-consciously — avoids specific reference to the word "illumination." But the reasoning is the same as that of the majority opinion in the lower court—even to the use of the word "facets".

We have already shown in our main brief, pages 33-42:

(1) that this inference as to the public interest is one based upon exceedingly controversial questions of fact—not supported by specific findings of the court or by the record;

(2) that the public interest in "illumination" would be better promoted by encouraging a multiplicity of competing agencies—each stimulated by the same incentive which is relied on in the case of

other men—the right to enjoy the fruits of their own industry;

(3) that in fact the judgment below would tend to diminish—not increase—the efficiency of the news-gathering services in the "illumination" of the public;

(4) that the assumed public interest is in direct conflict with a far more fundamental public interest—the public interest established by the First Amendment—namely, that the press should not be put in leading strings—even under the guise of "protecting" the public interest.

The unspoken premises which underlie the Government's claim of public injury are in the highest degree controversial. They certainly do not meet the tests laid down at page 10 of the Government brief with respect to the admitted facts—"as to which there was no dispute"—on which the Government stated that it would "solely rely."

5. The Assertion that Exclusiveness is not an Essential Element of Value in News.

The Government argues that the proprietary interest of AP members in the service they have established should be confiscated for the alleged benefit of the public. To justify this the Government makes the extraordinary contention that:

> "• • • exclusiveness is not an essential element of value in the news which AP gathers • • •." (Govt. br., p. 49.)

This contention is directly contrary to one of the Findings of Fact of the court below—and one to which the Government has not assigned error—namely, Finding 29, R. 2609, which expressly states that:

> "A large part of the value of news lies in its exclusiveness, reliability, and newness."

Similarly, the court below in its opinion said:

> "* * * it is essential to the protection of the main purpose that the member who furnishes 'spontaneous' news, *or AP itself, shall not destroy the value* of what is transferred by making it available to others, before it can be published." (R. 2598.)

Wholly apart from the finding—which is not appealed from and is binding on the Government—it is common knowledge that the right of first and exclusive publication of any product of the mind is an exceedingly important element of value.

That is what publishers buy from authors. The courts have repeatedly held, in motion picture cases,* that exclusive contracts for "first-run" theatres, with appropriate "clearances," are proper, and the Government itself is party to a consent decree in which such arrangements are authorized.**

Similarly, the Federal Communications Commission recognized the right on the part of broadcasting chains to give exclusive rights to individual stations for programs in their area. *National Broadcasting Co.* v. *United States*, 319 U. S. 190.

Indeed the Government itself at another point in its brief—page 64—says that the agreement not to sell AP news to any outsider is a:

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* *Westway Theatre Inc.* v. *Twentieth Century-Fox Film Corporation*, 30 F. Supp. 830 (D. C. Md., 1940); aff'd 113 F. (2d) 932 (C. C. A. 4th, 1940); *William Goldman Theatres Inc.* v. *Loew's Inc. et al.*, 54 F. Supp. 1011 (D. C. E. D. Pa., 1944). Cf. *Mid-west Theatres Co.* v. *Cooperative Theatres*, 43 F. Supp. 216 (D. C. E. D. Mich., 1941).

** *U. S.* v. *West Coast Theatres Inc. et al.* (U. S. D. C. S. D. Cal.) C. C. H. Trade Regulation Service, Par. 4206, Sec. 7.

"reasonable means of protecting the value of this news and confining it to the newspapers contributing to AP's support."

6. The Assertion That a "Unitary" Organization, Such as UP and INS, is Better than a Cooperative Because Its Interests Would Lie in "Expanding its Newspaper Clientele".

This statement of fact (Govt. br., pp. 98-9) is also controversial.

Other news agencies seek to protect the value of the reports they sell. The Government brief itself (pp. 41-2) shows that UP and INS both have numerous asset-value contracts for that purpose. It is particularly unpersuasive for the Chicago Sun to claim that a unitary organization would not and should not enter into contracts for the first and exclusive publication of newspaper material. The Sun itself has many such contracts.

The Chicago Sun secured the cancellation of the New York Herald Tribune Syndicate contract with the Chicago Journal of Commerce on the ground that:

"the service to the Chicago Sun had to be exclusive for Chicago (R. 1362)."

In addition to the service of The New York Herald Tribune Syndicate, the Chicago Sun buys other services on an exclusive basis (R. 856, 858, 867, 872, 873).

It, in turn, through The Chicago Sun Syndicate sells services to 69 newspapers on an exclusive basis (R. 876).

The need and desire to have something "distinctive" for publication—to set a paper apart from its competitors—is a normal and fundamental element of the newspaper business.

If the Government should succeed in preventing AP from recognizing this fact in the treatment of its own mem-

bers, while at the same time leaving UP and INS—and The Chicago Sun and others—free to enter into any arrangements which they may desire to make with their customers—as the Government intimates that it may do (Govt. br., p. 100)—then AP would certainly be under a very serious handicap.

AP could no longer supply distinctive news—while its competitors could do so—and its ability to compete would be seriously impaired.